

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2011 MSPB 77**

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Docket No. AT-0831-10-0929-I-1

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**Thimmappayya Hasanadka,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

August 17, 2011

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Jeffrey C. Renz, Esquire, Atlanta, Georgia, for the appellant.

Matthew Johnson, Esquire, Atlanta, Georgia, for the appellant.

Roxann Johnson, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of an initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) concerning the appellant's Civil Service Retirement System (CSRS) retirement annuity. For the reasons set forth below, we DISMISS, as barred by res judicata, the appellant's claim regarding the cost of providing a survivor annuity to his former spouse. We DISMISS, for lack of jurisdiction, the appellant's claim concerning the apportionment of his annuity for his post-divorce service, and we

REMAND that matter to OPM for further consideration consistent with this Opinion and Order.

### BACKGROUND

¶2 The appellant and his first wife divorced in 2001. A “Second Amended Order for [CSRS] Benefits” issued by an Indiana state court provided, in relevant part, that the appellant’s former spouse was entitled to 53% of the appellant’s gross monthly annuity under CSRS. Initial Appeal File (IAF), Tab 9, Subtab 2d at 17. An “Amended Order for Maximum Survivor Annuity Benefits” issued by the same court required the appellant to designate his former spouse as his sole beneficiary of survivor benefits under CSRS, and provided that the appellant’s former spouse was entitled to “the maximum possible former spouse survivor annuity under the [CSRS].” *Id.* at 28-31.

¶3 By letter dated November 4, 2002, OPM informed the appellant that it had processed his former spouse’s claim for a portion of his civil service retirement benefit, and that, in accordance with the orders issued by the Indiana state court, it would be paying the appellant’s former spouse 53% of his gross retirement annuity benefit. IAF, Tab 29 at 94. OPM also informed the appellant that it intended to honor the court’s former spouse survivor annuity award. *Id.*

¶4 The appellant retired from federal service in 2005. By letter dated June 2, 2006, OPM informed the appellant that, pursuant to the relevant court orders, it was to pay his former spouse 53% of the appellant’s gross annuity of \$6,063.00, or \$3,213.39 per month. IAF, Tab 29 at 96. OPM also reiterated that it intended to honor the court’s former spouse survivor annuity award. *Id.* After obtaining initial and reconsideration decisions from OPM concerning the proper calculation of the former spouse annuity, the appellant filed a Board appeal, *Hasanadka v. Office of Personnel Management*, AT-0831-07-0026-I-1 (“*Hasanadka I*”), in which he argued that the court order providing an annuity to his former spouse was inconsistent with OPM’s regulations because it awarded his former spouse a

greater share of his annuity than him. However, the Board rejected that argument and affirmed OPM's reconsideration decision concerning the former spouse annuity. *Hasanadka I*, Final Order (Apr. 6, 2007). The U.S. Court of Appeals for the Federal Circuit also affirmed OPM's decision. *Hasanadka v. Office of Personnel Management*, 248 F. App'x 190 (Fed. Cir. 2007).

¶5 In June 2008, OPM responded to an inquiry from the appellant concerning the amount of his former spouse's survivor annuity and the reduction of his annuity in order to provide for the survivor annuity. IAF, Tab 9, Subtab 2c at 1. The appellant requested reconsideration of OPM's initial decision. *Id.*, Subtab 2b.

¶6 The appellant filed a Board appeal in January 2010 alleging that OPM had failed to issue a reconsideration decision despite his numerous requests and inquiries. After initially finding that the Board had jurisdiction over the appeal due to OPM's failure to issue a final decision, the administrative judge subsequently issued an initial decision remanding the matter to OPM for issuance of a reconsideration decision "addressing the appellant's contention that the cost of the survivor annuity should be maintained by his former spouse and not by him." *Hasanadka v. Office of Personnel Management*, MSPB Docket No. AT-0831-10-0341-I-1 ("*Hasanadka II*"), Initial Decision at 3 (May 14, 2010). The initial decision further provided that "[i]n the event OPM finds such costs are the appellant's responsibility, the reconsideration decision should also include the correct calculation for the cost of the survivor annuity." *Id.* at 3-4.

¶7 In a reconsideration decision dated July 29, 2010, OPM affirmed its June 2008 initial decision. IAF, Tab 9, Subtab 2a. Specifically, OPM found that the divorce decree was acceptable for processing as providing the appellant's former spouse with a maximum survivor annuity. *Id.* at 3. OPM further found that the divorce decree did not specify who was to pay the cost to provide the survivor benefit, and that, pursuant to its regulations, it would therefore collect the annuity reduction from the appellant's annuity. *Id.*

¶8 On August 5, 2010, the appellant filed the present Board appeal challenging OPM's reconsideration decision. IAF, Tab 1. The administrative judge initially scheduled a hearing at the appellant's request, IAF, Tab 6, but the appellant later withdrew his hearing request and requested a decision on the written record. IAF, Tab 21.

¶9 The administrative judge issued an initial decision affirming OPM's reconsideration decision. IAF, Tab 30. She found that the appellant was barred by collateral estoppel from arguing that the divorce decree was not "acceptable for processing" by OPM because that issue was fully litigated in *Hasanadka I*. *Id.* at 4-5. She further found that the divorce decree did not provide that the appellant's former spouse was responsible for the cost of the survivor annuity, and that OPM therefore properly reduced the appellant's annuity in order to provide the survivor annuity. *Id.* at 5-7.

¶10 On review, the appellant argues that the administrative judge failed to consider the arguments contained in his closing brief. Petition for Review (PFR) File, Tab 1 at 1-5. He also argues that OPM's regulations were not intended to provide a former spouse with an interest in the portion of a retirement annuity attributable to service after the end of the marriage. *Id.* at 5-8. He requests that the Board direct OPM to apply the distribution of the annuity set forth in the divorce decree to only that portion of the annuity that was earned during the marriage. *Id.* at 9. The appellant also argues that OPM's regulation providing that the cost of providing a survivor annuity shall be deducted from the employee's annuity unless the divorce decree specifies otherwise is an unconstitutional deprivation of property. *Id.* at 9-13.

¶11 In its response to the petition for review, OPM notes that the issue in *Hasanadka I* was whether the apportionment provisions in the divorce decree were acceptable for processing, not whether the survivor annuity provisions in the decree were acceptable for processing. PFR File, Tab 4 at 4. OPM argues, however, that the appellant's claims in the present appeal are nevertheless barred

by res judicata because he could have challenged the survivor annuity provisions in the divorce decree in *Hasanadka I*. *Id.* at 4-5 (citing *Encarnado v. Office of Personnel Management*, [116 M.S.P.R. 301](#) (2011)).

¶12 The appellant has filed a reply to OPM's response to the petition for review. PFR File, Tab 5. With respect to OPM's argument concerning res judicata, the appellant argues that OPM failed to provide proper notice of how it was calculating his and his former spouse's annuities and that he was therefore unaware of the issues raised in the present appeal when he filed his first Board appeal.<sup>1</sup>

### ANALYSIS

The appellant's claims regarding the cost of providing a survivor annuity are barred by res judicata.

¶13 In its response to the petition for review, OPM appears to concede that the administrative judge incorrectly applied collateral estoppel because the issue in the present appeal is not identical to that in *Hasanadka I*. PFR File, Tab 4 at 4-5. OPM argues, however, that issues relating to the survivor annuity provisions in the divorce decree could have been raised in the appellant's first Board appeal, and that the appellant is therefore barred from relitigating such claims by res judicata. *Id.* at 5. Under the doctrine of res judicata (also known as "claim preclusion"), a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995); *see Muyco v. Office of Personnel Management*, [114 M.S.P.R. 694](#), ¶ 9 (2010). Res judicata precludes parties from relitigating issues that were, or could have been, raised in

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<sup>1</sup> The Board's regulations do not provide for a reply by the party filing a petition for review. *See* 5 C.F.R. § 1201. 114(d). However, because the issue of res judicata was not specifically raised until OPM filed its response to the petition for review, we have considered the appellant's arguments on that issue.

the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Peartree*, 66 M.S.P.R. at 337. For claim preclusion to bar a new claim, it must be based on the same set of transactional facts as the earlier one. *International Air Response v. U.S.*, [302 F.3d 1363](#), 1368 (Fed. Cir. 2002); *Jet Inc. v. Sewage Aeration Systems*, [223 F.3d 1360](#), 1363 (Fed. Cir. 2000) (explaining that “courts have defined ‘transaction’ in terms of a ‘core of operative facts,’ the ‘same operative facts,’ or the ‘same nucleus of operative facts,’ and ‘based on the same, or nearly the same, factual allegations.’”).

¶14 There is no dispute that the appellant’s first Board appeal was a matter within the Board’s jurisdiction that resulted in a final judgment on the merits. There is also no dispute that the same parties were involved in both *Hasanadka I* and the present appeal. The remaining questions, therefore, are whether the same cause of action is involved in both appeals and whether the issues in the present case could have been raised in the prior appeal.

¶15 In *Encarnado*, the Board held that an appellant’s prior Board appeal challenging OPM’s denial of his application for a retirement annuity barred a subsequent appeal in which he sought to pay a deposit for the same service at issue in his first appeal. The Board reasoned that the appellant sought to make a deposit in order to qualify for a retirement annuity, and that therefore the same cause of action (*i.e.*, the appellant’s entitlement to a retirement annuity) was involved in both appeals. *Id.*, [116 M.S.P.R. 301](#), ¶ 12. The Board found that although the appellant did not raise the issue of his eligibility to make a deposit in his first appeal, he could have done so. *Id.*

¶16 Consistent with *Encarnado*, we find that the cause of action in the present case, as in *Hasanadka I*, is the proper calculation of the annuities to be paid to the appellant and his former spouse, respectively. Certainly, the specific arguments raised in the two cases differ. Whereas his primary argument in *Hasanadka I* was

that OPM regulations prohibited his former spouse from receiving a greater annuity payment than he did, his primary argument in the present appeal is that his former spouse should pay the full cost of providing a survivor annuity. However, in both cases the appellant's goal is to increase the annuity he receives (and to decrease that of his former spouse). We therefore find that the same cause of action is involved in *Hasanadka I* and the present appeal.

¶17 The appellant argues that he did not raise the issue of who is responsible for paying the cost of the survivor annuity in *Hasanadka I* because OPM did not specifically inform him who would be paying that cost. PFR File, Tab 5 at 3. In effect, he argues that the issue is not one that could have been raised in the prior appeal. We disagree. On June 2, 2006, OPM informed the appellant that it had processed his former spouse's claim for a portion of his civil service retirement benefit, and that in accordance with the divorce decree, it would be paying the appellant's former spouse 53% of his gross annuity of \$6,063.00, or \$3,213.39 per month. IAF, Tab 29 at 96. One could not reasonably interpret that statement from OPM as an indication that the appellant's former spouse would pay the full cost of providing a survivor annuity. OPM did not indicate that it was reducing his former spouse's annuity payment to pay the cost of providing a survivor annuity, and the specific amount OPM stated it would pay to the appellant's former spouse was equal to a full 53% of the gross annuity. Thus, to the extent the appellant believed his former spouse should have been paying the full cost of providing a survivor annuity (as he argues in the present appeal), OPM's June 2, 2006 letter placed him on notice that OPM did not interpret the relevant court order in that manner.<sup>2</sup> Accordingly, we find that the appellant was on notice as

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<sup>2</sup> Moreover, we note that the use of the term "gross annuity" in both the relevant court order and OPM's correspondence should have put the appellant on notice of how OPM would deduct the cost of providing a survivor annuity. OPM has defined the term "gross annuity" as "the amount of monthly annuity payable after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deduction." [5 C.F.R. § 838.103](#). By definition, therefore, if the appellant's spouse was receiving a

of at least June 2006 that OPM was not going to recover the cost of providing a survivor annuity entirely from his former spouse's annuity, and we find that he was not prevented from raising the issue of who is responsible for paying the cost of the survivor annuity in *Hasanadka I*.

¶18 We find that all of the requirements for the application of res judicata are met. We therefore find that the appellant's claim regarding the cost of providing a survivor annuity is barred by the final judgment in *Hasanadka I*.

The Board lacks jurisdiction over the issue of whether the appellant's former spouse is entitled to a share of his entire annuity, or only to a share of the portion of the annuity earned during the marriage.

¶19 The issue of Board jurisdiction is always before the Board and may be raised by either party or sua sponte by the Board at any time during a Board proceeding. See *Edwards v. Department of State*, [98 M.S.P.R. 481](#), ¶ 4 (2005). The existence of Board jurisdiction is a threshold issue in adjudicating an appeal. See *Giove v. Department of Transportation*, [89 M.S.P.R. 560](#), ¶ 8 (2001), *aff'd*, 50 F. App'x 421 (Fed. Cir. 2002). The Board's jurisdiction over CSRS retirement cases is granted by [5 U.S.C. § 8347](#)(d)(1). The Board generally has jurisdiction over an OPM determination on the merits of a matter affecting the rights or interests of an individual under CSRS only after OPM has issued a final decision. [5 U.S.C. § 8347](#)(d)(1); [5 C.F.R. § 831.110](#). "[T]he scope of an appeal involving federal retirement benefits is limited to those matters addressed in OPM's reconsideration decision." *Dragonette v. Office of Personnel Management*, [71 M.S.P.R. 384](#), 386 (1996).

¶20 OPM's July 29, 2010 reconsideration decision only addresses the issue of who is responsible for paying the cost of the survivor annuity. See IAF, Tab 9, Subtab 2a. OPM has not issued a reconsideration decision specifically addressing

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percentage of his gross annuity, the cost of providing a survivor annuity was deducted from the self-only annuity before the appropriate percentage was applied.



whether the appellant's former spouse is entitled to 53% of the entire annuity, or only 53% of that portion of the annuity that was earned during the marriage. Where OPM's reconsideration letter contains no determination on a particular issue, the Board lacks jurisdiction over that issue. *See Deese v. Office of Personnel Management*, [116 M.S.P.R. 166](#), ¶ 9 (2011).

¶21 We note that the Board has found jurisdiction in retirement appeals despite the absence of a final decision from OPM where OPM has improperly failed or refused to issue a reconsideration decision after issuing an initial decision. *McNeese v. Office of Personnel Management*, [61 M.S.P.R. 70](#), 73-74, *aff'd*, 40 F.3d 1250 (Fed. Cir. 1994) (Table). However, we find that the record before us in this appeal does not establish that OPM has improperly failed or refused to issue a reconsideration decision on the issue of the apportionment of the portion of the appellant's retirement annuity earned after his divorce in 2001. Although the appellant clearly raised the issue of his post-divorce service in his October 2, 2009 correspondence to OPM, IAF, Tab 9, Subtab 2b at 3-4, the initial decision in *Hasanadka II* directed OPM to issue a reconsideration decision only with respect to the cost of providing a survivor annuity. *Hasanadka II*, Initial Decision at 3 (May 14, 2010). It is therefore unclear whether OPM's failure to address the effect of the appellant's post-divorce service was a conscious refusal to address that issue, or whether OPM was simply addressing only the specific issue remanded to it by the Board. We find that it is preferable to allow OPM to express its position clearly before we determine whether to exercise jurisdiction.

¶22 Should OPM address the merits of the appellant's argument concerning his post-divorce service in a new reconsideration decision, the appellant would have the opportunity to file another Board appeal over which the Board would clearly have jurisdiction. [5 U.S.C. § 8347](#)(d)(1); [5 C.F.R. § 831.110](#). Should OPM refuse to address the merits of the appellant's argument and instead refer back to its September 27, 2006 reconsideration decision finding that "the apportionment amount has been properly paid," IAF, Tab 29 at 101-03, the Board would have

the authority to determine whether OPM committed legal error or abuse of discretion in refusing to issue a new reconsideration decision.<sup>3</sup> *See Muyco v. Office of Personnel Management*, [104 M.S.P.R. 557](#), ¶ 12 (2007).

### ORDER

¶23 Accordingly, we DISMISS, as barred by res judicata, the appellant's claim regarding the cost of providing a survivor annuity to his former spouse. We DISMISS, for lack of jurisdiction, the appellant's claim concerning the apportionment of his annuity for his post-divorce service, and we REMAND that matter to OPM for further consideration consistent with this Opinion and Order.

¶24 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your

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<sup>3</sup> Because the Board lacks jurisdiction over the issue of the appellant's post-divorce service in this appeal, we are not presently able to address whether the appellant's claim with respect to that issue is barred by res judicata as a claim that could have been raised in his first Board appeal. *See Roesel v. Peace Corps*, [111 M.S.P.R. 366](#), ¶ 13 (2009) (res judicata is a basis to dismiss an appeal over which the Board has jurisdiction). However, to the extent the Board has jurisdiction over a future appeal raising that issue, the applicability of res judicata would be properly before the Board in such an appeal.

representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

¶25 If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms 5, 6, and 11](#).

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.